TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909

No. 312.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

HARVEY SUTTON AND ROBERT MILLER.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON.

FILED DECEMBER 16, 1908.

(21445)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 649.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

HARVEY SUTTON AND ROBERT MILLER.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON.

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A United States District Court, Eastern District of Washington, Spokane, Washington.

UNITED STATES OF AMERICA, plaintiff in error, *vs.* HARVEY SUTTON AND ROBERT MILLER, defendants in error.	No. 693.

Transcript of record upon writ of error to the Supreme Court of the United States.

Names and addresses of attorneys of record:

A. G. Avery, United States district attorney; Joseph B. Lindsley, assistant United States attorney, attorneys for plaintiff, Exchange National Bank Bldg., Spokane, Wash.

Groff and Cromwell, attorneys for defendants, Mohawk Bldg., Spokane, Wash.

1 UNITED STATES OF AMERICA.

Eastern District of Washington, United States District Court, September term, 1908.

The grand jurors of the United States, chosen, selected, and sworn in and for the Eastern District of Washington, upon their oaths present: That Harvey Sutton and Robert Miller, each late of the county of Yakima, in the State of Washington, did heretofore, to wit, on about the third day of September, nineteen hundred and eight, in Yakima County, Washington, and within the jurisdiction of this court, unlawfully introduc*t* and take into the Indian country, to wit, into and upon a certain Indian allotment numbered 670, within the limits of the boundary of the Yakima Indian Reservation, in the Eastern District of Washington, which said allotment had theretofore been allotted to a certain Indian, a member of the Yakima tribe of Indians, named George Wesslike, under and by virtue of the provision of the act of Congress of February eighth, eighteen hundred and eighty-seven, entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes" (24 Stat. L., 388) said allotment being then and now one held in trust by the Government for said allot'ee and being inalienable by the said allot'ee without the consent of the United States certain ardent spirits and intoxicatiog liquor, to wit, alcohol, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States.

A. G. AVERY,
United States Attorney.

JOSEPH B. LINDSLEY,
Assistant United States Attorney.

(Endorsements.)

A true bill. D. B. Forheingham, foreman grand jury.

Presented to the court by the foreman of the grand jury in open court in the presence of the grand jury and filed in the United States District Court September 29, 1908. W. H. Hare, clerk.

In the District Court of the United States for the Eastern District of Washington, Eastern Division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
HARVEY SUTTON AND ROBERT MILLER, defendants.
No. 693. Demurrer.

And now comes Harvey Sutton and Robert Miller, and having read the indictment heretofore presented against said Harvey Sutton and Robert Miller and filed in this court on the 29th day of September, 1908, file this their demurrer to the said indictment, and for grounds for demurring thereto say:

1. That said indictment does not charge nor allege any offense against the laws of the United States.

2. That the facts set out and alleged in said indictment do not constitute any offense against the laws of the United States, and the said Harvey Sutton and Robert Miller pray the judgment of this court that for want of a sufficient indictment against them they be by the court dismissed and discharged.

GROFF & CROMWELL,
Attorneys for Defendants.

I, Charles G. Cromwell, of counsel for defendants in the above entitled cause, do hereby certify that the foregoing demurrer to the indictment is, in my opinion, well founded in law.

CHARLES G. CROMWELL,
Attorney for Defendants.

(Indorsed:) Filed October 12, 1908. W. H. Hare, clerk U. S. District Court, Eastern District of Washington.

3 In the District Court of the United States for the Eastern District of Washington, Eastern Division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
HARVEY SUTTON AND ROBERT MILLER, DEFENDANT.
No. 693. Stipulation.

It is hereby stipulated and agreed that for the purpose of the demurrer to the indictment in the above-entitled cause, the following are agreed to and admitted as facts in the case:

1. That the Yakima Indian Reservation, in the Eastern District of Washington, is inhabited by the Yakima and other Indians under

the general charge and control of an Indian agent and superintendant of the United States.

2. That prior to September third, 1908, a very large number of allotments of land within said reservation had been made to Indians entitled thereto, which said allotments had been made and allotted under and by virtue of the provision of the acts of Congress of Feb. 8, 1887, known as the general allotment act.

3. That allotment No. 670, described in the indictment, is a part of and within the boundaries of the Yakima Indian Reservation, and the same had been made and allotted, and the usual trust patent thereto issued to the allottee named in the indictment under the provision of the act of February 8, 1887, prior to September, 1908.

4. That the trust limitation has not yet expired and the title to said allotment is still being held in trust by the Government that the title to said allotment is not alienable by the allottee without the consent of the United States.

5. That on or about September 3, 1908, the defendants did go on and upon said allotment described in the indictment, taking and carrying with them certain ardent spirits and intoxicating liquor, to wit, alcohol, in a demijohn and flasks.

Dated this 12th day of October, A. D. 1908.

A. G. AVERY,
United States Attorney.

JOSEPH B. LINDSLEY,
Assistant United States Attorney.

4 CHARLES G. CROMWELL,
Attorney for Defendant.

(Endorsement:) Filed October 12, 1908. W. H. Hare, clerk. United States District Court, Eastern District of Washington.

5 In the District Court of the United States for the Eastern District of Washington, Eastern Division.

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* HARVEY SUTTON AND ROBERT MILLER, defendants.	No. 693. October 23, 1908. At Spokane.

A. G. Avery, U. S. atty.; Joseph B. Lindsley, asst. U. S. atty. Charles D. Cromlen for defendants.

WHITSON, district judge. The defendants stand indicted under section 2139 R. S., as amended by the act of January 30, 1897 (29 Stat. L., 506), for having introduced ardent spirits and intoxicating liquor upon a certain Indian allotment made under the act of February 8, 1887 (24 Stat. L., 388), and within the boundaries of the Yakima Indian Reservation. A demurrer raises the question whether the acts charged constitute a crime. While it does not appear from

the indictment, upon argument it was conceded that the allotment referred to was made prior to the amendatory act of May 8,
6 1906 (34 Stat. L., 182), which in terms retains jurisdiction over allottees until the expiration of the trust period and issuance of the final patent.

The decision in the matter of Heff (197 U. S., 488), settled several questions which had theretofore been obscure.

First. Under the act of 1887 the completion of the allotment and the issuance of the preliminary patent conferred citizenship upon the allottee.

Second. Allottees, being citizens of the United States, are also citizens of the State in which they reside, and since the act provides that they shall be subject to the laws, both civil and criminal, of that State, the act of January 30, 1897, can no longer be enforced as against the sale of intoxicants to such allottees.

Third. The status of citizenship once conferred upon the Indians, it is beyond the power of Congress to resume its control and guardianship without the consent of the individual Indian and the State.

Fourth. The sale of intoxicating liquors is a police regulation which may no longer be enforced as to those who have become citizens by virtue of having received allotments, for by the same act which conferred citizenship Congress parted with its control of those matters which fall within the police power.

Fifth. The general police power is reserved to the States
7 subject to the limitation that they may not trespass on the rights and powers vested in the National Government.

Counsel, while conceding these propositions, would sustain the indictment upon grounds claimed to be in harmony with them.

The position of the prosecution, as I understand it, is concisely and ably stated in a brief of Solicitor-General Hoyt (filed in another case), which the district attorney has adopted as a part of his argument. Briefly it is this: The title to allotted lands during the period for which they are held in trust being in the United States, it may control those lands even to the extent of establishing police regulations over them.

Reliance is had upon United States vs. Rickert, 188 U. S., 432, and Rainbow et al. vs. Young, sheriff, 161 Fed., 835, and particularly upon the case first mentioned; and the contention is based generally upon those decisions of the Supreme Court which uphold the power of Congress to dispose of and make all needful rules and regulations respecting the public domain, such as Gibson vs. Chouteau, 13 Wall., 92; Jourdan vs. Barrett, 4 How., 168, and Camfield vs. United States, 167 U. S., 518; and upon the powers vested in the Federal Government for the enforcement and execution of the laws as declared in ex parte Siebold, 100 U. S., 371; in re Neagle, 135 U. S., 1; in re Debbs, 168 U. S., 564, and Ohio vs. Thomas, 173 U. S., 276.

8 But none of those cases go to the extent of holding that the police power is not wholly within state authority except where

it is incidental to and necessary for enforcing the laws of the United States or the protection of property over which it has exclusive control.

United States vs. Rickert, supra, cannot be construed as announcing anything beyond the power to interfere for the exemption of allotted lands from local or state taxation. Clearly this is the principle upon which the decision rests, for "no authority exists for the State to tax lands which are held in trust by the United States for the purpose of carrying out its policy in reference to these Indians" is the language of the Supreme Court. And in the discussion of that case in the matter of Heff, supra, it was said:

"But the fact that property is held subject to a condition against alienation does not affect the civil or political status of the holder of the title."

We have seen that the Supreme Court has designated the statute under which the defendants are indicted as a police regulation, but it was dealing with the sale of liquor to an allotted Indian and not with the prohibition against the introduction of intoxicating liquors into the Indian country. If that phase of the statute also may properly be so construed, there would seem to be no ground upon which the indictment can be sustained unless it be in the enforcement of such police regulations as the United States is entitled to invoke for the protection of its own property.

In the License cases, 5 How., 504, speaking of the police power, it was said:

"Without attempting to define what are the peculiar subjects or limits of this power, it may safely be affirmed that every law for the restraint and punishment of crime, for the preservation of public peace, health, and morals, must come within this category."

So in the Slaughterhouse cases, 16 Wall., 36, it was thus referred to:

"This power is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property."

We are not left, however, to the necessity of deduction from abstract principles, but have the aid of their specific application to the very matter here in issue.

Ex parte Dick, 141 Fed., 5, arose out of an indictment for introducing liquor into the Indian country. The Circuit Court of Appeals (Ninth Circuit) in discussing the jurisdiction, said:

"We do not think that Congress can reserve or exercise such police power within the territorial limits of a State. The police power of the United States can only be exercised where the legislative authority of Congress excludes territorially all State legislation. (United States v. De Witt, 9 Wall., 41, 45, 19 L. Ed., 593; Slaughterhouse cases, 16 Wall., 36, 64, 21 L. Ed., 394.)"

And so the statute was construed in United States vs. Boss,
10 160 Fed., 132, and perhaps counsel do not seriously contend to the contrary.

This extended reference has been made for the purpose of emphasizing the only possible ground upon which the offense charged may be punished under existing laws. It is true that the Supreme Court in Dick vs. United States, 208 U. S., 340, did not agree with the Circuit Court of Appeals, but the difference of opinion was not based upon the construction of statutes, but upon a treaty stipulation with the Nez Perce Indians; otherwise the decisions are in harmony.

The defendants having been held, therefore, to answer for the violation of a police regulation upon land duly identified and set apart, it remains to inquire whether the United States has jurisdiction to invoke the police power in view of the citizenship of the Indians upon whose allotment the liquor was taken.

The prevention of waste, the inhibition against alienation which might lead to complications and thereby impair the convenient carrying out of the object in view, namely, to transfer the land unencumbered, are rights existing by virtue of the legal title which the United States still holds, and which were designated by the Supreme Court in the matter of Heff, supra, as "mere property rights" which "do not affect the civil or political status of the allottees." The
11 authority to protect the land which is ultimately to be conveyed may be asserted, but control over the Indian, which is purely a matter of state concern, referable to the police power, has been surrendered, and he cannot be deprived of rights which are conceded to other citizens. The allotment segregates the land. This conclusion follows the reasoning of Judge Hanford in United States vs. Four Bottles of Sour Mash Whiskey, 90 Fed., 720. The taking of liquor onto an allotment affects neither the title nor the possession. If it could be considered as affecting the latter it could hardly come within the provisions of the statute, which must be strictly construed. Allotted land, coupled with citizenship of the allottee, can no longer be deemed Indian country within the meaning of that term as used by Congress and construed by the courts. (Ex Parte Crow Dog, 109 U. S., 556; United States vs. Martin, 14 Fed., 817; Forty-three gallons of Cognac Brandy, 11 Fed., 47.)

Besides the law relates solely to the good order, quietude, and peace of the community. The legislation was intended to prevent disorderly conduct and restrain the Indians from excesses. The plausible argument of federal control, by any process of reasoning which may be applied, leads always to the protection of the Indian and not to the preservation of his property. So long as a place is within the exclusive jurisdiction of the United States the police power may be exercised by it, but when once surrendered it
12 belongs to the States when not necessary for the assertion of those things which are national. To sustain the indictment upon the ground contended for would present the anomaly of a judicial declaration that one citizen may be denied privileges granted to

another, and would be equivalent to holding that over every parcel of public land claimed or unclaimed it is competent for Congress to provide for the exercise of police powers within the States; and this would amount to a distinct invasion of their domestic concerns with which it is not, cannot be, concerned. Allotted Indians either are or are not citizens; and the Supreme Court has taken Congress at its word and declared that they are. Once invested with that dignity, in the absence of treaty stipulations, they are entitled to all the rights, privileges, and immunities of other citizens, and the courts may not discriminate against them. The language of the Supreme Court in United States vs. Dick, supra, as applied to the issue here for decision, is significant, and, as I read it, decisive:

"If this case depended alone upon the federal liquor statute forbidding the introduction of intoxicating drinks into the Indian country, we should feel obliged to adjudge that the trial court erred in not directing a verdict for the defendant, for that statute, when enacted, did not intend by the words 'Indian country,' to embrace any body of territory in which, at the time, the Indian title had been extinguished, and over which and over the inhabitants of which (as was the case of Culdesac) the jurisdiction of the State, for all purposes of government, was full and complete. (Bates v. Clark, 95 U. S., 204; ex parte Crow Dog, 109 U. S., 556, 561.)"

Reference has been made to Article IX of the treaty with the
13 Yakima Indians, said to bring the case within the rule of the last-mentioned decision. That article reads as follows:

"The said confederated tribes and bands of Indians desire to exclude from their reservation the use of ardent spirits and to prevent their people from drinking the same, and, therefore, it is provided that any Indian belonging to said confederated tribes and bands of Indians who is guilty of bringing liquor into said reservation, or who drinks liquor, may have his or her annuities withheld from him or her for such time as the President may determine."

Article IX of the treaty with the Nez Perce Indians reads:

"It is further agreed that the lands by this agreement ceded, those retained, and those allotted to the said Nez Perce Indians, shall be subject for a period of twenty-five years to all the laws of the United States prohibiting the introduction of intoxicants into the Indian country, and that the Nez Perce Indian allottees, whether under the care of an Indian agent or not, shall, for a like period, be subject to all the laws of the United States prohibiting the sale or other disposition of intoxicants to Indians."

It will be observed that in the case of the latter the jurisdiction of the United States was expressly retained, while as to the former the sole provision was that annuities could be withheld for such time as the President might determine. Besides, the defendants are not Indians.

There is no analogy between the treaty stipulations which will bring that made with the Yakimas within the decision of the Su-

preme Court, or which will justify a construction that the treaty was intended to be other than what it purports to be upon its face.

Aside from considerations which deny the jurisdiction on
14 principle, this court is concluded not only by the decision of the Supreme Court, but by the appellate court to which it is directly amenable.

Treating the stipulation of counsel concerning the time of the allotment as within the indictment, the demurrer must be sustained and the defendants discharged; but if it is the purpose to seek a review in the appellate court an appropriate order will be made for securing their attendance should the views here expressed not meet with approval.

15 In the District Court of the United States for the Eastern District of Washington, Eastern Division.

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* HARVEY SUTTON AND ROBERT MILLER, DEFENDANTS.	No. 693.

Now, on this 16th day of November, 1908, the court having heretofore considered the demurrer interposed by the defendants to the indictment in the above entitled cause, and the court having been fully advised upon the law in the premises; and having heretofore filed in this cause an opinion sustaining the contention of the defendants urged in support of said demurrer; now, therefore, reference being hereto made to the opinion heretofore filed in this cause, it is by the court,

Considered and ordered that the demurrer of the defendants to said indictment be, and the same is hereby sustained, to which order and ruling the plaintiff by the United States attorney excepts, and plaintiff's exception is hereby allowed.

Done in open court this 16 day of November, A. D. 1908.

EDWARD WHITSON,
District Judge.

(Endorsement:) Filed November 16, 1908. W. H. Hare, clerk, U. S. District Court, Eastern District of Washington.

16 In the District Court of the United States for the Eastern District of Washington, Eastern Division.

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* HARVEY SUTTON AND ROBERT MILLER, defendants.	No. 693. Petition for writ of error.

Now comes the United States of America, plaintiff, and says that on or about the 16th day of November, A. D. 1908, this entered an order sustaining the demurrer of the defendants to the indictment returned by the grand jury in the above entitled cause, in which order and ruling and in the judgment of the court so determin-

ing said demurrer certain errors were committed to the prejudice of said plantiff, United States of America, all of which will more fully appear in detail in the assignment of errors, which is filed with this petition. Wherefore, the said plaintiff, United States of America, prays that a writ of error be issued in its behalf out of the United States Supreme Court, according to the terms and provisions of the acts of March 2, 1907 (34 Stat. L., 1246), for the correction of the error so complained of, and that a transcript of the record proceedings and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States, and that such order and further proceedings may be had as may be proper in the premises.

A. G. AVERY,
United States Attorney.
JOSEPH B. LINDSLEY,
Assistant United States Attorney.

(Endorsement:) Filed November 17, 1908. W. H. Hare, clerk, United States District Court, Eastern District of Washington.

17 In the District Court of the United States for the Eastern District of Washington, Eastern Division.

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* HARVEY SUTTON AND ROBERT MILLER, defendants.	No. 693. Assignment of errors.

The United States of America, plaintiff in this action and the plaintiff in error, in connection with its petition for a writ of error, makes the following assignment of errors which it avers occurred during the progress of said cause, to wit:

1. The court erred in sustaining the defendants' demurrer to the indictment returned by the grand jury.

2. The court erred in holding and deciding (and because thereof sustaining the demurrer to the indictment) that allotments of land to Indians within an Indian reservation, made under the act of Congress of February 8, 1887 (24 Stat. L., 388), prior to the amendatory act of May 8, 1906 (34 Stat. L., 182), and while the title to such allotments was still held in trust by the United States changed the character of the land embraced within such allotments, so that the same was no longer Indian country within the meaning of section 2139, R. S., as amended by the act of January 30, 1897 (29 Stat. L., 506), prohibiting the introduction of intoxicating liquor into the Indian country.

3. The court erred in not overruling the defendants' demurrer to the indictment and in not holding the defendants to trial on said indictment.

A. G. AVERY,
United States Attorney.
JOSEPH B. LINDSLEY,
Assistant United States Attorney.

(Endorsement:) Filed November 17, 1908. W. H. Hare, clerk, U. S. District Court.

18 In the District Court of the United States for the Eastern District of Washington, Eastern Division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
HARVEY SUTTON AND ROBERT MILLER, DEFENDANT. } No. 693.

Order allowing writ of error.

On this 17 day of November, A. D. 1908, comes the plaintiff above named, United States of America, by its attorneys, and filed herein and presented to the court its petition praying for the allowance of a writ of error to the Supreme Court of the United States under and according to the terms of the acts of Congress of March 2, 1907 (34 Stat. L., 1246), and presenting therewith an assignment of errors intended to be urged by it, praying also that a transcript of the records, proceedings, and papers in said cause upon which said judgment and order sustaining the demurrer to the indictment herein was rendered, duly authenticated, may be sent to the United States Supreme Court, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof the court does allow the writ of error.

Done in open court this 17th day of November, A. D. 1908.

EDWARD WHITSON,
United States District Judge for the Eastern District of Washington.

(Endorsement:) Filed November 17th, 1908. W. H. Hare, clerk, United States District Court, Eastern District of Washington.

19 In the Supreme Court of the United States.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable Edward Whitson, Judge of the United States District Court for the Eastern District of Washington, greeting:

Because in the record and proceedings, as also in the rendition of the judgment and the entering of the order sustaining the demurrer to the indictment found by the grand jury in the case pending before you between United States of America, plaintiff, and Harvey Sutton and Robert Miller, defendants, a manifest error hath happened, to the great damage of the said plaintiff, United States of America, as by its complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment

and order sustaining the demurrer to the indictment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, in the District of Columbia, within thirty (30) days from the date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct
20 that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court, this 17th day of November, in the year of our Lord one thousand nine hundred and eight, and in the one hundred and thirty-third year of the independence of the United States.

The above writ is hereby allowed.

EDWARD WHITSON,
United States District Judge,
Eastern District of Washington.

Attest:
[SEAL.]

W. H. HARE,
Clerk United States District Court for the Eastern District of Washington.

The foregoing writ of error served on me and service accepted this 17th day of November, A. D. 1908, at Spokane, Washington.

CHARLES G. CROMWELL,
Attorney for Defendants in Error.

20½ (Indorsed): No. 963. In the District Court of the United States for the Eastern District of Washington. United States of America vs. Harvey Sutton et al. Writ of error. Filed November 17, 1908. W. H. Hare, clerk.

21 In the Supreme Court of the United States.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
HARVEY SUTTON AND ROBERT MILLER, DEFENDANTS IN ERROR.

Citation on writ of error.

The President of the United States to Harvey Sutton and Robert Miller, and Charles G. Cromwell, your attorney, greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States to be held at Washington, in the District of Columbia, within thirty days from the date of this citation and writ, pursuant to a writ of error filed in the clerk's office of the United States District Court for the Eastern Dis-

trict of Washington, wherein the United States of America is plaintiff in error, and you, the said Harvey Sutton and Robert Miller, are defendants in error, to show cause, if any there be, why the judgment and order rendered against the plaintiff in error sustaining the defendants' demurrer to the indictment in said cause, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 17th day of November, A. D. 1908, and in
22 the one hundred and thirty-third year of the independence of the United States of America.

EDWARD WHITSON,
United States District Judge,
Eastern District of Washington.

Attest:
[SEAL.]

W. H. HARE,
Clerk of the United States District Court for
the Eastern District of Washington.

The foregoing citation served on me and service accepted this 17th day of November, A. D. 1908, at Spokane, Washington.

CHARLES G. CROMWELL,
Attorney for Defendant in Error.

22½ (Indorsed:) No. 963. In the District Court of the United States for the Eastern District of Washington. United States of America vs. Harvey Sutton et al. Citation on writ of error. Filed November 17, 1908. W. H. Hare, clerk.

23 UNITED STATES OF AMERICA
vs.
HARRY SUTTON AND ROBERT MILLER. } No. 693. Arraignment.

Journal entry, vol. 1, page 355.

Now, on this 29th day of September, A. D. 1908, the defendants in the above entitled cause having been indicted by the names of Harvey Sutton and Robert Miller, and upon their arraignment they give their true names as Harvey Sutton and Robert Miller, being interrogated by the court if they had an attorney, they answered that they had not, or means to employ counsel, and thereupon the court appointed Groff and Cromwell attorneys for the defendants', and by order of the court they were given further time to plead.

24 UNITED STATES OF AMERICA
vs.
HARVEY SUTTON AND ROBERT MILLER. } No. 693.

Journal entry, vol. 1, page 368.

Now, on this 24th day of October, 1908, the defendants appeared in open court, and being informed by the court that the demurrer to the indictment was sustained, and that the defendants would be

dismissed from custody, pending an appeal if the plaintiff so desired, and thereupon the court ordered the defendants to enter into a recognizance, to wit:

Be it remembered that upon this day personally appeared Harvey Sutton and Robert Miller, and each being duly sworn, acknowledged himself indebted to the United States of America in the sum of $200.00 (two hundred dollars) each, to be levied of their goods and chattels, lands and tenements, upon the following conditions, to wit: That they shall personally appear before the United States District Court at Spokane, from term to term, or at such time and place as may be ordered by the court, then this recognizance to be void, otherwise to remain in full force and effect.

25 In the District Court of the United States for the Eastern District of Washington. Eastern division.

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* HARVEY SUTTON AND ROBERT MILLER, defendants.	No. 693. Præcipe.

To the clerk of the above named court:

You will prepare a transcript of the complete record in the above entitled action to be filed in the office of the clerk of the United States Supreme Court at Washington, in the District of Columbia, under the writ of error to be perfected in said court, and include in said transcript the following pleadings, proceedings, papers, records, and filings, to wit:

Indictment;
Defendants' demurrer to indictment:
Agreed stipulation as to facts;
Court's opinion sustaining defendants' demurrer to indictment;
Order sustaining demurrer to indictment;
Petition for writ of error;
Assignment of errors;
Order allowing writ of error;
Writ of error and admission of service thereon;
Citation on writ of error and admission of service thereon;
This præcipe,

and any and all other records, entries, pleadings, proceedings, papers, and filings necessary or proper to make a complete record upon said writ of error in said cause; said transcript to be prepared as required by law and the rules of this court and the rules of the Supreme Court of the United States.

A. G. AVERY,
United States Attorney.
JOSEPH B. LINDSLEY,
Assistant United States Attorney.

(Endorsement:) Filed November 17th, 1908. W. H. Hare, clerk, United States District Court, Eastern District of Washington.

26 *Clerk's certificate to transcript of record.*

UNITED STATES OF AMERICA,
Eastern District of Washington, ss:

I, W. H. Hare, clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify that the foregoing typewritten pages, numbered from 1 to 26, inclusive, constitutes and are a complete, true, and correct copy of the records, papers, and all proceedings had in said action, as the same remains of record and on file in said District Court, and that the same which I transmit constitute my return to the annexed writ of error lodged and filed in my office on the 17th day of November, A. D. 1908.

I also annex and transmit the original citation in said action.

I further certify that the cost of preparing and certifying said record amounts to the sum of $17.20, and that the same will be included in my account against the United States for the quarter ending December 31, 1908.

In testimony whereof I have hereunto set my hand and affixed the seal of said District Court, at the city of Spokane, in said Eastern District of Washington, this 4th day of December, A. D. 1908, and the independence of the United States the one hundred and thirty-third.

[SEAL.]

W. H. HARE,
Clerk, U. S. District Court,
Eastern District of Washington.

(Indorsement on cover:) File No. 21445. E. Washington, D. C. U. S. Term No. 649. The United States, plaintiff in error, vs. Harvey Sutton and Robert Miller. Filed December 16th, 1908. File No. 21445.

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In the Supreme Court of the United States.

OCTOBER TERM, 1908.

No. 312.

THE UNITED STATES, PLAINTIFF IN ERROR,

v.

HARVEY SUTTON AND ROBERT MILLER.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON.

BRIEF FOR THE UNITED STATES.

STATEMENT OF CASE.

Sutton and Miller were indicted in the District Court for introducing liquor into the Indian country (Rec., 1)—

> to wit, into and upon a certain Indian allotment No. 670, within the limits of the boundary of the Yakima Indian Reservation, in the Eastern District of Washington, which said allotment had theretofore been allotted to a certain Indian, a member of the Yakima tribe of Indians, named George Wesslike, under and

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by virtue of the provision of the act of Congress of February 8, 1887, entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes" (24 Stat. L., 388), said allotment being then and now one held in trust by the Government for said allottee and being inalienable by the said allottee without the consent of the United States.

A demurrer was filed to the indictment on the ground that it did not charge any offense against the United States (Rec., 2).

The following facts were stipulated and agreed to for the purposes of the demurrer to the indictment (Rec., 2–3):

1. That the Yakima Indian Reservation, in the Eastern District of Washington, is inhabited by the Yakima and other Indians under the general charge and control of an Indian agent and superintendent of the United States.

2. That prior to September third, 1908, a very large number of allotments of land within said reservation had been made to Indians entitled thereto, which said allotments had been made and allotted under and by virtue of the provision of the act of Congress of February 8, 1887, known as the general allotment act.

3. That allotment No. 670, described in the indictment, is a part of and within the boundaries of the Yakima Indian Reservation, and the same had been made and allotted, and the

usual trust patent thereto issued to the allottee named in the indictment under the provision of the act of February 8, 1887, prior to September, 1908.

4. That the trust limitation has not yet expired and the title to said allotment is still being held in trust by the Government; that the title to said allotment is not alienable by the allottee without the consent of the United States.

5. That on or about September 3, 1908, the defendants did go on and upon said allotment described in the indictment, taking and carrying with them certain ardent spirits and intoxicating liquor, to wit, alcohol, in a demijohn and flasks.

The demurrer was sustained (Rec., 8), and the United States sued out a writ of error to this court, pursuant to the act of March 2, 1907, 34 Stat., 1246 (Rec., 8–9).

ASSIGNMENTS OF ERROR.

(Rec., 9.)

1. The court erred in sustaining the defendants' demurrer to the indictment returned by the grand jury.

2. The court erred in holding and deciding (and because thereof sustaining the demurrer to the indictment) that allotments of land to Indians within an Indian reservation made under the act of Congress of February 8, 1887 (24 Stat. L., 388), prior to the amendatory act of May 8, 1906 (34 Stat. L., 182), and while the title to such allotments was still held in trust by the United States changed the character of the land embraced within such allotments, so that the same was no longer Indian country within the meaning of section 2139, Revised Statutes, as amended by the act of January 30, 1897 (29 Stat. L., 506), prohibiting the introduction of intoxicating liquor into the Indian country.

3. The court erred in not overruling the defendants' demurrer to the indictment and in not holding the defendants to trial on said indictment.

The act of January 30, 1897 (29 Stat., 506), entitled "An act to prohibit the sale of intoxicating drinks to Indians, providing penalties therefor, and for other purposes," provides:

> That * * * any person who shall introduce or attempt to introduce any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or intoxicating liquor of any kind whatsoever into the Indian country, *which term shall include any Indian allotment while the title to the same shall be held in trust by the Government*, or while the same shall remain inalienable by the allottee without the consent of the United States, shall be punished by imprisonment for not less than sixty days, and by a fine of not less than one hundred dollars for the first offense and not less than two hundred dollars for each offense thereafter: *Provided, however*, That the person convicted shall be committed until fine and costs are paid. * * *

The General Allotment Act of February 8, 1887 (24 Stat., 388), provides:

> SEC. 5. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees,

which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: * * *

SEC. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or

> under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens,whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.

The act of May 8, 1906 (34 Stat., 182) amends the last-quoted section so as to read as follows:

> SEC. 6. That at the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section five of this act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made and who has received a patent in fee simple under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who

has voluntarily taken up within said limits his residence, separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property: *Provided*, That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: *Provided further*, That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States.

* * * * *

The Yakima Reservation was established pursuant to the treaty of June 9, 1855 (12 Stat., 951), which, after providing for the cession of certain lands to the United States, reserves other lands for the use and occupation of said Indians, as follows:

ARTICLE II. There is, however, reserved, from the lands above ceded for the use and occupation of the aforesaid confederated tribes and bands of Indians, the tract of land included within the following boundaries, to wit:

* * * * *

All which tract shall be set apart, and, so far as necessary, surveyed and marked out, for the exclusive use and benefit of said confederated tribes and bands of Indians, as an Indian reservation; nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without permission of the tribe and the superintendent and agent. And the said confederated tribes and bands agree to remove to, and settle upon, the same within one year after the ratification of this treaty. In the meantime it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States; and upon any ground claimed or occupied, if with the permission of the owner or claimant.

Guaranteeing, however, the right to all citizens of the United States to enter upon and occupy as settlers any lands not actually occupied and cultivated by said Indians at this time and not included in the reservation above named.

* * * * *

That treaty also provided:

ARTICLE VI. The President may, from time to time, at his discretion, cause the whole or such portions of such reservation as he may

think proper to be surveyed into lots and assign the same to such individuals or families of the said confederated tribes and bands of Indians as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with Omahas [10 Stat., 1044], so far as the same may be applicable.

* * * * *

ARTICLE IX. The said confederated tribes and bands of Indians desire to exclude from their reservation the use of ardent spirits, and to prevent their people from drinking the same, and therefore it is provided that any Indian belonging to said confederated tribes and bands of Indians who is guilty of bringing liquor into said reservation, or who drinks liquor, may have his or her annuities withheld from him or her for such time as the President may determine.

ARGUMENT.

I.

That the State of Washington has general jurisdiction over Indian lands and reservations within its limits is settled by the decision of this court in *Draper* v. *United States* (164 U. S., 240). In that case the act to enable Montana, Washington, and other States to be admitted to the Union was construed, the court holding that the provision thereof that the lands owned or held by Indian tribes should remain under the absolute jurisdiction and control of Congress until the title thereto was extinguished, did not operate to deprive the State of all jurisdiction over such lands, but had reference to the allotment policy of the United States, and was intended to preserve the necessary jurisdiction to carry out the purposes of Congress in respect to such matters after the reservations had been broken up by allotment and the Indians themselves had passed under the authority of the State.

II.

The question as to the power of Congress to forbid the introduction of liquor upon an Indian allotment within the general jurisdiction of a State is concluded, adversely to the ruling of the District Court, by the decision of this court in *Couture* v. *United States* (207 U. S., 581).

In the Couture case the indictment was for introducing liquor into the Indian country, to wit, "the Bad River Reservation," in the county of Ashland, Wis. It appears from the record in that case that Couture had carried a bottle of whisky upon the allotment of David Green, a Chippewa Indian, in the Bad River Reservation (pp. 3–6); that at the time of the commission of the offense about two-thirds of the reservation had been allotted pursuant to the treaty of September 30, 1854, with the Chippewa Indians of Lake Superior (p. 9), which authorized the President to assign 80 acres of the lands reserved for the use of the Indians to each head of a family or single person over 21 years of age, for his or their separate use, and, at his discretion, to issue patents therefor to such occupants "with such restrictions of the power of alienation as he may see fit to impose;" that all the Indians over twenty-one years of age or heads of families had received allotments (pp. 15–16); that David Green had received his allotment and patent in 1872 (pp. 11, 12); that Couture was also a Chippewa Indian and had received an allotment and patent therefor (pp. 20–21); and that for twenty years and since having received their allotments the Indians had exercised the privilege of voting in the State, and some had held town offices and had served upon juries in Ashland County (pp. 14, 16).

The patents to Green and other allottees, it was conceded in this court, conveyed the land allotted to the allottee and his heirs, subject only to the re-

striction that they should not "sell, lease, or in any manner alienate the said tract without the consent of the President."

It was contended in that case that the act of January 30, 1897, was unconstitutional as applied to the introduction of intoxicating liquor upon land allotted and patented to an Indian under the treaty of September 30, 1854.

The trial court overruled this contention, and its judgment was affirmed by this court, which rendered no opinion but cited the cases of *United States* v. *Rickert* (188 U. S., 432) and *McKay* v. *Kalyton* (204 U. S., 458) in support of its judgment (207 U. S., 581–582).

The Rickert and McKay cases related to what is known as "trust allotments" made pursuant to the general allotment act of February 8, 1887.

In the Rickert case it was held that neither the lands allotted, nor the permanent improvements thereon, nor the personal property obtained from the United States and used by the Indians on the allotted lands, were subject to State or local taxation while the title to the lands was held in trust by the United States.

In the McKay case it was held that the United States had retained such control over the allotments to Indians that, except as provided by acts of Congress, controversies involving the determination of the title to and possession of Indian allotments while the same were held in trust by the United States were not primarily cognizable by any court, State or

Federal; hence the State court had no jurisdiction of that suit, which was one of the character referred to.

In the Couture case the court did not notice the distinction, which some of its decisions seem to imply, between an allotment the title to which is held in trust by the United States and one as to which there is simply a restriction upon the power of alienation. (*Libby* v. *Clark*, 118 U. S., 250, 255; *Schrimpscher* v. *Stockton*, 183 U. S., 290, 299; *Lykins* v. *McGrath*, 184 U. S., 169, 171; *United States* v. *Paine Lumber Co.*, 206 U. S., 473.) It is immaterial, however, for the purposes of the present case, whether there be any real distinction between such allotments, as this case is that of a trust allotment, as well as one in which there is a restriction on the alienation of the allotment.

The reference of the court in the Couture case to the Rickert and McKay cases necessarily implies that so long as the title to an allotment remains in trust in the United States, it has power to prohibit the introduction of liquor thereon.

III.

In line with the ruling of the court in the Couture case are its decisions with respect to the jurisdiction of Congress over the public lands within the States. (*Gibson* v. *Chouteau*, 13 Wall., 92, 99; *Jourdan* v. *Barrett*, 4 How., 169, 185; *Camfield* v. *United States*, 167 U. S., 518, 525).

In *Jourdan* v. *Barrett* the court said:

> By the Constitution Congress is given "power to dispose of and make all needful rules and regulations respecting the territory or other property of the United States;" for the disposal of the public lands, therefore, in the new States, where such lands lie, Congress may provide by law; and having the constitutional power to pass the law, it is supreme; *so Congress may prohibit and punish trespassers on the public lands.*

Congress has made it an offense against the United States to cut timber on the public lands or "upon any Indian reservation, or other lands belonging to or occupied by any tribe of Indians under authority of the United States." (Revised Statutes, sec. 2461; id., sec. 5388, as amended by act of June 4, 1888, 25 Stat., 166.)

Provisions for the protection of trees, fences, etc., on lands of the United States, and for the protection of such lands from trespass by cattle, etc., and prescribing penalties for violations thereof, are contained in the act of March 3, 1875, chapter 151 (18 Stat., 481).

Camfield v. *United States, supra*, involved the constitutionality of an act of Congress to prevent the unlawful enclosure of the public lands. In upholding the act, the court, speaking by Mr. Justice Brown, said (167 U. S., 525–526):

> *The General Government doubtless has a power over its own property analogous to the police power of the several States, and the extent*

> *to which it may go in the exercise of such power is measured by the exigencies of the particular case.* If it be found to be necessary *for the protection of the public, or of intending settlers,* to forbid all inclosures of public lands, the Government may do so, though the alternate sections of private lands are thereby rendered less available for pasturage. The inconvenience, or even damage, to the individual proprietor does not authorize an act which is in its nature a purpresture of government lands. While we do not undertake to say that Congress has the unlimited power to legislate against nuisances within a State, which it would have within a Territory, we do not think the admission of a Territory as a State deprives it of the power of legislating for the protection of the public lands, though it may thereby involve the exercise of what is ordinarily known as the police power, so long as such power is directed solely to its own protection. A different rule would place the public domain of the United States completely at the mercy of State legislation.

It is manifest therefore that, even where lands or other property of the United States are within the limits and general jurisdiction of the State, the rights of the Federal Government in regard thereto are very different from those of an ordinary proprietor. The individual must look to the State for the punishment of trespassers upon his property. But the United States is not dependent upon the State governments for such protection. This court has

held it "to be an incontrovertible principle that the Government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it." (*Ex parte Siebold*, 100 U. S., 371, 395.)

In that case the court, after stating the principle just quoted, said:

> This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent. This power to enforce its laws and to execute its functions in all places does not derogate from the power of the State to execute its laws at the same time and in the same places. The one does not exclude the other, except where both can not be executed at the same time. In that case the words of the Constitution itself show which is to yield. "This Constitution and all laws which shall be made in pursuance thereof * * * shall be the supreme law of the land."

To the same effect are *In re Neagle* (135 U. S., 1); *In re Debs* (158 U. S., 564).

In *Ohio* v. *Thomas* (173 U. S., 276) it was held that the State could not, in the exercise of its police powers, interfere with the administration of a national soldiers' home within its limits and general jurisdiction.

It is said, however, that the purposes of the legislation under consideration is the protection of the Indians and not the preservation of the lands allotted.

But if the United States has the power, under the Constitution, to prohibit any trespass upon such land—and it undoubtedly has that power—it is immaterial what the motives may be that prompt such action upon its part.

It is well settled that the matter of motive can not be inquired into by the courts when Congress is acting in the exercise of its constitutional powers. (*McCray* v. *United States*, 195 U. S., 27.)

It is for Congress to determine what shall constitute a trespass upon the public lands. It is certainly not beyond the scope of the constitutional functions of the Federal Government to require that the use of the public lands within the States shall be subservient to the public good.

There is no limitation in the Constitution which prevents Congress from saying that certain articles deemed injurious to the welfare of those lawfully residing upon the public lands within the States shall not be carried thereon under penalty, although such articles are not necessarily injurious to the lands themselves. The statute prohibiting the enclosure of public lands within the States as well as Territories, referred to in *Camfield* v. *United States*, *supra*, was passed primarily for the protection of the public and intending settlers, as the opinion of the court recognizes.

The power here contended for is illustrated by the recognized authority of Congress to regulate the use of the mails in such a manner as to protect the people against fraud and other injuries. (*Public*

Clearing House v. *Coyne*, 194 U. S., 497.) No general power to legislate for the protection of the people against such wrongs resides in the Federal Government, but having been given control over the postal system, it may regulate the use of the same for the best interests of the country.

The proposition, reduced to its briefest limits, is simply this: As proprietor of the public lands within the States, the United States may prohibit any entry upon such lands, or permit such entry upon conditions; as a government, clothed with adequate powers thereto by the Constitution, it may punish any violation of its inhibitions or restrictions as to the use of such lands.

The contention here made does not involve any claim to the exercise of general police powers over the public lands within the States, as asserted by the District Court. A limited authority to prevent trespassing upon such lands, including Indian allotments while the title thereto is held in trust by the United States, is alone contended for. No general authority to define and punish offenses upon the public lands within the States is asserted.

The Rickert and McKay cases are conclusive as to the paramount and controlling, if not exclusive, authority of Congress over Indian allotments within the States while the title thereto is held in trust by the United States. Its jurisdiction over such allotments, for the protection of the Indians, is certainly coequal with its jurisdiction over the public lands, for the protection of the public generally or

intending settlers. Considering the fact that the Indians have, from the foundation of the Government, been committed to the peculiar protection of Congress, no improper or unconstitutional motive can be attributed to it when it provides that no liquor shall be introduced upon an Indian allotment while the title to the same is held in trust by the United States. Besides, the introduction of liquor on allotments is not only a menace to the Indians personally, but may affect injuriously the value of the property.

IV.

The legislation in question has in view something more than the protection of the individual allottee. The allotment of lands upon an Indian reservation is a gradual process. All of the Indians of a given tribe do not ordinarily receive allotments and trust patents at one and the same time. There may be unallotted Indians residing upon reservations long after others have received allotments. In the present case the stipulation of facts states "that prior to September third, 1908, a very large number of allotments of lands within said reservation had been made to Indians entitled thereto" under the provisions of the general allotment act of February 8, 1887. This implies that all of the Indians had not received allotments or trust patents, and the records of the Interior Department confirm this view. It may be doubted whether, under these circumstances, even the allotted Indians are subject to the laws of the State, as section 6 of the act of February 8, 1887, defers subjec-

tion to State authority until "the *completion* of said allotments and the patenting of the lands to said allottees." In any event, those Indians who receive allotments and trust patents subsequent to the act of May 8, 1906 (34 Stat., 182), amending section 6 of the general allotment act of February 8, 1887, will not become citizens or subject to the laws of the State until they receive final patents. It is manifest that the adequate protection of such Indians, as well as of those unallotted, against the deleterious influences of intoxicants requires that the Government also prohibit the introduction of liquor upon the allotted lands within the reservation.

In *United States* v. *Mullin* (71 Fed., 682), the court sustained the authority of the Federal Government, in pursuance of treaty obligations similar to those existing in the case of the Yakimas, to protect the Winnebago Indians in the possession, use, and occupancy of their reservation in Nebraska, notwithstanding the allotment in severalty of a portion of the reservation. District Judge Shiras said (pp. 684–686):

> The treaty, by express terms, imposed this duty upon the United States, and the fact that part of the reservation has been allotted in severalty to a portion of the tribe does not release the United States from this treaty obligation. These allotments are not yet perfected. The acts of Congress providing therefor expressly restrict all right of alienation, and all right of contract between the Indians and the whites, for a period of twenty-five years. It can not be known whether all or

any of the allottees in severalty will remain on the lands assigned for the period of twenty-five years, and it may be that, by abandonment, the allottees may fail to perfect an alienable title to the lands allotted them. Such failure, however, would not deprive the tribe, as a whole, of their right to the reservation; and it would still be the duty of the United States, under the terms of the treaty, to protect the tribe in the use and occupancy of the reservation. Much stress was laid in the argument upon the fact that, under the acts of Congress providing for the allotment of lands in severalty, the allottees become, and are declared to be, citizens of the United States; it being assumed that, so soon as the Indian becomes a citizen of the United States, the Government is relieved from all treaty obligations to him. The conclusion is not derivable from the premise. Certainly, the Government is as much obliged, to its own citizens, to perform its duties and obligations, as it is to those who are not citizens. The question is, does the duty exist? If so, it should be performed to citizen or noncitizen alike. It not unfrequently happens that, in cases of the acquisition of territory by conquest or purchase, the Government binds itself to confer citizenship upon the inhabitants of the acquired territory, and also to recognize and protect the title held by them; and it has never been held that the acquisition of the status of citizenship deprives the individual of his right to insist that the treaty obligation, providing for the recognition and pro-

tection of the title to property, should be observed and fulfilled. For illustration, suppose an act declaring that all Indians within the State of Nebraska should henceforth be citizens of the United States; would such enactment, and the consequent acquisition of citizenship by Indians, terminate all treaty obligations on part of the United States to them, and thereby relieve the United States from the duty of protecting the Indian in the use and occupancy of the lands reserved and set apart for him? The United States would still hold the title of the lands in trust for the Indians, and the conditions of the trust would not be changed by the fact that the Indian had become a citizen. It must therefore be true that the United States, notwithstanding the fact that portions of the Winnebago Reservation have been allotted in severalty to a portion of the tribe, or if it were true that the entire reservation had been allotted in severalty, is yet bound, by its treaty stipulation, to protect the Indians, whether citizens or wards of the nation, in the use and occupancy of the reservation lands which have never yet been opened to occupancy by the whites. A right of occupancy thus acquired by an Indian tribe in virtue of treaty stipulations is a right that can only be dealt with by the United States, as is expressly held in *Beecher* v. *Wetherby* (95 U. S., 517–525) and *U. S.* v. *Thomas* (151 U. S., 577–583); and it is not claimed that either the executive or legislative branch of the Government has, by direct action, in any way terminated the right of

> the Winnebago Indians to the reservation in question, or that by convention with the Indians, or in any other mode, the United States has sought to relieve itself from the duty it assumed, in the treaty of March, 1865, of protecting these Indians in the possession of the reservation lands.

To the same effect is *Rainbow* v. *Young*, 161 Fed., 835, decided June 8, 1908. In that case the Circuit Court of Appeals for the Eighth Circuit sustained the authority of the Federal Government to cause collectors to be excluded from the Winnebago Reservation on days when payments were being made to the Indians. Speaking by Judge Van Devanter, the court said (p. 836–837):

> Of the questions discussed by counsel we deem it necessary to here notice the single one of the commissioner's authority to give the direction which was disregarded by Mr. Sloan and in the orderly execution of which he was removed from the reservation. While the members of the Winnebago tribe have received allotments in severalty and have become citizens of the United States and of the State of Nebraska, their tribal relation has not been terminated. They are not permitted to alienate, mortgage, or lease their allotments without the sanction of the Secretary of the Interior. Their lease moneys are collected and disbursed by officers of the United States. Their lands and some, at least, of their other property are not taxable, and the United States maintains a reservation, an agency, and

> a training school for their benefit. In short, they are regarded as being in some respects still in a state of dependency and tutelage which entitles them to the care and protection of the National Government, and when they shall be let out of that state is for Congress alone to determine.

See also *United States* v. *Logan*, 105 Fed., 240; *in re Lincoln*, 129 Fed., 247.

In *Dick* v. *United States* (208 U. S., 340) the court sustained an agreement made on behalf of the United States with the Nez Perce Indians, prior to the allotment of their lands in severalty to them, whereby it was provided that all of the lands of the Nez Perces, including those ceded to the United States, those allotted to the Indians, and those retained by them, should be subject to the laws prohibiting the introduction of liquor into the Indian country for a period of twenty-five years. The particular tract of land upon which liquor was introduced in that case had been ceded by the Indians to the United States, and by it deeded to the probate judge of Nez Perce County in trust for the inhabitants of the village of Culdesac, an organized town of the State of Idaho.

Notwithstanding the presumption that the Nez Perce Indians, by virtue of the allotments that had been made to them, had become citizens of the United States (*In the Matter of Heff*, 197 U. S., 488), the court upheld the power of Congress to control the introduction of liquor upon the lands referred to, including those occupied by the village of Culdesac, for the limited period stated.

The Heff case is without any controlling influence over the question presented in this case. That was the sale of liquor in a State to an allotted Indian outside of the Indian country, whether an Indian reservation or an Indian allotment. All that that decision properly holds, therefore, is that an individual Indian, who has been declared a citizen by Congress and made subject to the laws of the State in which he may reside, is no longer a ward of the Federal Government and subject to its peculiar protection in matters of police. It does not negative the authority of Congress to continue to regulate commerce with the Indian tribes of which such emancipated Indian may be, or may have been, a member. It does not deal with the power of Congress to forbid the introduction of liquor upon the reservation or district occupied by any Indian tribe, and of which the United States has the fee, whether such tribe, in whole or in part, has received allotments of lands. It does not consider the authority of Congress to prevent the introduction of liquor upon Indian allotments while the title to the same is held in trust by the United States.

The suggestion of the District Court that "to sustain the indictment upon the ground contended for would present the anomaly of a judicial declaration that one person may be denied privileges granted to another," is clearly without merit. All persons are equally prohibited from introducing liquor upon an Indian allotment while the title thereto is held in trust by the United States. The allottee constitutes

no exception. He is not denied any fundamental privileges inhering in citizenship with respect to the use of the lands occupied by him. He does not own the land, the fee thereof being in the United States, and its use by him is necessarily subject to the controlling right and title of the Federal Government, at least when such power is exercised for the benefit of himself and other Indians and is not inconsistent with the trust.

It would seem therefore that, both upon the ground of the ownership of the lands and the proper protection of the Indians—allotted and unallotted, citizens and wards of the Government—in pursuance of treaty stipulations, the authority of Congress may be maintained to regulate the introduction of liquor upon such allotments while the title thereto remains in trust in the United States.

It is respectfully submitted that the judgment of the District Court should be reversed.

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